# 83-564



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

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No. _____

C. DULA HAWKINS, ET AL.

PETITIONERS

versus

JNO. McCALL COAL EXPORT CORP.

RESPONDENTS

---

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Hamrick and Hamrick
J. Nat Hamrick, Esq.
312 North Main Street
Rutherfordton, NC 28139
704-287-3359
Counsel for Petitioner

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## QUESTIONS INVOLVED

1. Should this action have been dismissed by the United States District Court for the District of Maryland, at Baltimore, for failure to join necessary parties under rule 19(b) when at the time of the dismissal the following had taken place:

C. Dula Hawkins was already a party plaintiff.

J. Nat Hamrick, Jr. was already a party plaintiff.

Petersen Enterprises, Inc. and Ruben Antonio had filed motions to be joined as parties plaintiff on the 30th day of November, 1981. ( app. p. 42 )

And when these motions had not been heard or acted upon until the order dismissing this case was filed on the 13th of April, 1982, at which time it was declared moot. ( app. p. 21 )

And when the only remaining possible party Maria Florencia Villa Aulet, daugher of deceased Commodore Villa, who is a resident of Argentina.

And when there was an outstanding order joining this minor as a party plaintiff, with her mother as her guardian. ( app. p. 45 )

And when defendants were on the one hand attempting to dismiss because the Argentine minor was not a party plaintiff and at the same time refusing to notorize defendant, McCall's signature, (which they admit was genuine) to the crucial letter in this litigation, which letter was demanded by the Argentine Children's Court before it would approve the Argentine minor, Maria Florencia Villa Aulet's mother, Aulet Garcia de Villa's, intervention on the minor's behalf in this action.

2. Did the United States Court of Appeals for the Fourth Circuit commit error when in its order affirming the United States District Court for the District of Maryland it:

Held that the trial judge committed error by dismissing the case under rule 19(b).

And when it affirmed for a violation of rule 41 (b), when that rule had never been mentioned in any motions, briefs, arguments, or the trial court's opinion.

And when plaintiffs secured approval from the Argentine court of the joinder of the minor through her mother as guardian , after argument in the United States Court of Appeals for the Fourth Circuit, but before the decision. ( App. p. 1 )

And when plaintiff moved the United States Court of Appeals for the Fourth Circuit to suspend the rules for good cause and consider the ruling of the Argentine Court at which time all necessary parties plaintiff could have been joined in this action.

And when the Fourth Circuit Court of Appeals denied that motion.

And when the Fourth Circuit Court of Appeals denied plaintiffs motion for a rehearing en banc.

The following is a list of parties to this action:

J. Nat Hamrick, Jr.

C. Dula Hawkins

Ana Maria Aulet Garcia de Villa, guardian for Maria Florencia Villa Aulet

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## TABLE OF AUTHORITIES

GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOLKED ARE:

The plaintiffs are all residents of states other than Maryland and the defendants are residents of Maryland. Thus the original jurisdiction is based on the diversity of citizenship under 28 USC 1332.

The decisions in this case are in direct conflict with the opinion in this court in the following case. Provident Bank and Trust Company vs. Patterson 390 US 102, 19 L Ed 2d 936, 88 S Ct. 733, which holds that the equity and good conscience criteria set forth in rule 19(b) must be followed in considering a dismissal under that rule. Justice Harlan says on page 949:

> "Application of rule 19(b)'s 'equity and good conscience' test for determining whether to proceed or dismiss would doubtless have led to a contrary result below. The Court of Appeals' reasons for disregarding the rule remains to be examined."

The decision in this case is also in direct conflict with the Second Circuit in the case of Colonial Drive-In Theater, Inc.plaintiff appellant, vs. Warner

Bro. Pictures, Inc., et al., defendant appellees, Harmer Drive-In Theater, Inc. plaintiff appellant vs. Warner Bro. Pictures Inc. defendant. 252 F 2d 856 (1959).

AND the Third Circuit Court of Appeals in Dyotherm Corporation vs. Turbo Machine Co. 392 F 2d 146.

AND the Third Circuit in Lifer v. Carter 274 F 2d 815.

AND the Fifth Circuit in Grover v. Kizer Aluminum and Chemical Co. 258 F 2d 360.

AND the Fourth Circuit in McCargo v. Hedrick 545 F 2d 393 ( 1956).

AND Rule 17 of the Rules of the Supreme Court.

THE DECISIONS IN THIS CASE HAVE SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, OR SO FAR SANCTIONED SUCH A DEPARTURE BY A LOWER COURT, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION. (emphasis added)

United States Court of Appeals - Opinion dated May 31, 1983 UNPUBLISHED ( app. p. 11)

United States Court of Appeals- Order in respect to re-hearing - dated July 6, 1983. UNPUBLISHED ( App. p. 20)

## STATEMENT OF FACTS

In late 1976 J. Nat Hamrick, Jr., Ruben Antonio and Commodore Villa learned through friends in Buenos Aires that " Somisa" - " Socieded Mixdad de Siderurgica" were thinking of adding additional companies to their list of approved suppliers of coking coal for their steel operations.

Upon his return to the United States, J. Nat Hamrick, Jr. requested C. Dula Hawkins, assist him in locating additional suppliers of coal for Somisa.

While traveling through West Virginia on this mission, C. Dula Hawkins met Mr. Bill McCall, who called his cousin, Jno. McCall and made an appointment for C. Dula Hawkins to discuss the sale of coal.

Mr. Hawkins met with Mr. Jno. McCall and the result was the letter dated November 29, 1976. (app. p. 58 )

Later Mr. Jno. McCall refused to furnish financial information and samples of his coal needed by "Somisa", but he never cancelled the contract.

Mr. Nemenz, an officer of McCall Coal, called

J. Nat Hamrick, Jr. and said that he understood Somisa people were in the United States and he wanted to get the Somisa deal "back on track".

J. Nat Hamrick, Jr. and C. Dula Hawkins went to McCall's office and he stated that he wanted "Mannesman", a German firm to be his registered agent and it would deal through the Hawkins-Hamrick group and he would pay the group 6% of gross sales, which was considerably more than $1.50 per ton. But he still refused to supply the necessary information - so no sales at that time.

Plaintiffs later learned that McCall had gone directly to Somisa and sold almost two million dollars worth of coal. This action was taken while the letter of November 29, 1976 was in full force and effect.

Therefore on April 1, 1980 plaintiffs filed the original complaint in this action and obtained a nondestruct order.

Thereafter extensive discovery was initiated;

508 pages in deposition of John McCall ending Sept. 15, 1980, 315 pages of Albert W. Nemenz which ended July 24, 1980 and 769 pages of Nat Hamrick, Jr. completed on August 27, 1980.

During McCall's deposition he stated that he never discussed that matter with Mannesman.

That this is not true is shown by a cable from Mannesman to Ruben Antonio and Juan Carlos Villa which reads as follows:

> FROM HANSEN NEUERBURG GMBH, RUETOENSCHEIDER STR. 3,4300
> ESSEN 1
> TELEPHONE NO. (0201) 721, TELEX NO. 857633
>
> RE: SOMISA
>
> DEAR SIR:
>
> FROM MR. JOHN MCCALL, JR., PRESIDENT OF JNO MCCALL COMPANY IN BALTIMORE, WE LEARNED THAT YOU HAVE BEEN IN TOUCH WITH HIM AND THAT YOU FORESEE CERTAIN DEFINITE POSSIBILITIES TO SUPPLY SOMISA WITH COKING COAL IN THE FUTURE. WE HAVE BEEN JNO MCCALL REPRESENTATIVE FOR ARGENTINA FOR A NUMBER OF YEARS AND HE WANTS TO PURSUE THE DIALOG WITH YOU VIA US NOW.
>
> PLEASE LET US HAVE YOUR THOUGHT ON THE PRESENT SITUATION AS WELL AS YOUR OUTLOOK TOWARDS THE NEAR FUTURE, ESPECIALLY REGARDING THE VISIT OF THE DELEGATION FROM SOMISA TO USA. WE UNDERSTAND THAT THE DELEGATION HAS ALREADY ARRIVED SO YOUR IMMEDIATE REPLY WOULD BE APPRECIATED IN ORDER TO CO-ORDINATE YOUR AND OUR FURTHER STEPS.

BEST REGARDS.

HANSEN NEUERBURG, ESSEN

857663B HNCO D

During the deposition of Mr. Nemenz, several months later, plaintiffs, to their astonishment, HEARD MR. NEMENZ TESTIFY THAT THROUGH MERE CHANCE HE HAD DESTROYED THE SOMISA FILE JUST A FEW DAYS BEFORE THIS ACTION WAS SERVED ON MCCALL.

November 3, 1980. The defendants filed a motion to dismiss alleging that plaintiffs had not joined persons that they claimed to be necessary parties- to wit- Ruben Antonio and Petersen Enterprises, Inc., and Maria Florencia Villa Aulet.

November 18, 1980, Ruben Antonio assigned all of his rights in this action to J. Nat Hamrick, Jr. and C. D. Hawkins. This assignment was filed shortly thereafter.

November 26, 1980. Roland Petersen assigned all of his rights in this action to J. Nat Hamrick, Jr. and C. D. Hawkins.

January 16, 1981. Judge Ramsey issued an order that all discovery should cease.

April 17, 1981. Plaintiffs moved to have Ms. Villa join the action as guardian of her minor daughter.( App. p.48 )

April 20, 1981. Defendants moved for a partial lifing of the order of Jan. 16, 1981 to allow them to discover on consideration for the assignments.

May 28, 1981. The Court entered an order lifing the ban on discovery only to permit the defendants to resume discovery concerning consideration for the assignments.

July 3, 1981. The defendants, without notice to plaintiffs, intervened in the Children's Court in Argentina, in violation of the Court's limited discovery order, to try to prevent the joinder of the Argentine minor.

July 30, 1981. The Court, without objection from the defendants, granted plaintiffs' motion to allow Ms. Villa to join the action as a party plaintiff as guardian for her minor daughter. (App. p. 45 )

July 31, 1981. The defendants requested the clerk to file the " Answers- Hearings" in Argentina and transmitted these to the clerk. These were never introduced in evidence in this cause.

November 24, 1981. A status conference was held. Plaintiffs' counsel, J. Nat Hamrick, Sr. was not notified of this conference but was telephoned and asked the Judge to give him a hearing on the Motion to Dismiss. The Judge refused but gave him fifteen (15) days from November 24, 1981 to join the necessary parties. At this time there was in existance an order joining Ms. Villa as party plaintiff. ( App. p. 45 )

November 30, 1981. Plaintiffs moved to add Petersen Enterprises, Inc. and Ruben Antonio as parties plaintiff and to cancel their assignments. This was done to expedite the litigation because 435 pages of discovery had already taken place on the consideration for the assignments which assignments would have been estopped to deny even without consideration. NO HEARING WAS EVER HELD AND IN THE

JUDGE'S OPINION, HE DECLARED THEM 'MOOT".

( App. p. 39 ) (emphasis added)

December 15, 1981. Plaintiffs moved to compel the defendant to notorize the McCall letter on which this action is based so it could be introduced in the Children's Court in Argentina. This motion was never heard nor passed on by the Judge, nor hearing held. It disposed of it in the order of dismissal by the following language:

> "Plaintiffs have not stated any reason why authentication by defendants is essintial in this case. Specifically, they have not established why an authentication by the Clerk of Court or by witnesses to the signing, options available to them since this lawsuit was filed, is inadequate. In the absence of such a showing there is no reason why the court should obligate defendants to assist plaintiffs in structuring their lawsuit."

Plaintiffs' counsel,in its motion to compel, stated that the Argentine court needed the letter to permit Ms. Villa to represent her daughter. By permitting the defendants to refuse to have the McCall letter notorized the Court assisted in preventing the approval of the joinder of the minor.

Surely the defendants should not be permitted to, on the one hand move to dismiss this action for failure to join the Argentine minor and on the other hand actively attempt to prevent plaintiffs from getting approval from the Argentine Court. Nor should defendants have been permitted to file the Argentine " Answers- Hearings" which their counsel obtained for them in the Argentine court without notice to plaintiffs - more especially when all discovery was stayed except the discovery relating to consideration for the assignments of Petersen and Antonio.

December 15, 1981. Plaintiffs filed a motion to appoint a member of the Maryland bar as guardian for the Argentine minor. This was done to protect the rights of the minor in case the court later, without the hearing requested, considered the "Argentine - Answers" and voided its joinder of the minor as a plaintiff. ( Which it never did.) However, the court never voided that appointment but if it had her rights could have still been protected by the appointment of C. T. Williams, III. (There was no ruling on this motion.)

That this could have been done is shown by the following authorities:

Rule 17 (c) of the Federal Rules of Civil Procedure, which reads as follows:

> "(c) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. The Court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person." ( Emphasis added)

In Slade v Louisiana Power and Light Company, 418 F. 2d 125 (1969), Justice Bell, Ainsworth and Godbold, speaking for the Court say on page 126:

> "[3] It is well settled that '*** where a guardian or other representative of a minor already has been appointed and qualified by a state court, his capacity, when he seeks to act in federal court, is tested by the law of the state in which the district court is held, but if an infant or incompetent does not have a

validly appointed state representative, the federal court in which suit is brought may name a guardian ad litem or next friend to represent him, regardless of state law.' 2 Barron and Holtzoff, Federal Practice and Procedure ( Wright ed., 1961), § 488. Accord: Travelers Indemity Co. v. Bengston, 231 F 3d 263 ( 5th Cir. 1956), aff'g 132 F. Supp. 512 ( W.D. La., 1955); Fallat v Gouran, 220 F 2d 325 ( 3d Cir. 1955); Brimhall v. Simmons, 338 F 2d 702 ( 6th Cir. 1964). See also 3A Moore Federal Practice, ( 2d ed., 1969) ¶ 17.26:

January 13, 1982. Defendants moves the court to reconsider its order joining Ms. Villa in the lawsuit as guardian of her minor daughter. This motion was never heard - and when the case was dismissed for failure to join the Argentine minor, there was in existence and in the record an order joining her. ( App. p. 45 )

In a further effort to move the case to trial plaintiffs stated on the record that if they won the case, 1/5 of any recovery would go to the minor daughter of Juan Carlos Villa and if the case was lost, they would pay the costs. This would have prevented any risk to the defendants that they do not already run because even if this case is dismissed the

Argentine minor can bring suit in Maryland for her part of the loss.

In spite of all of the efforts of the plaintiff to secure formal approval of the Argentine Children's Court ( which they never believed was necessary), the court declined to require the defendant to authenticate John McCall's signature so that formal approval in Argentina could be effectuated.

In its order of dismissal under rule 19(b), the court ruled that the motions of Petersen's Enterprises, Inc. and Ruben Antonio as parties plaintiff were "moot" because the Argentine minor had not been joined.

At the time of the dismissal, April 13, 1982, nothing had been done on defendants motion to reconsider the courts order making Ms. Villa a party plaintiff as guardian of her minor daugher and the order joining her is still outstanding.

Plaintiffs appealed to the United States Court of Appeals for the Fourth Circuit. After briefs and arguments but before the case had been decided, plaintiffs obtained approval from the Argentine Children's Court for Ms. Villa's appearance as guardian for her daughter in this action. Plaintiffs

filed two motions to suspend the rules and to include in the appeal the authority which they had, after months and months of effort, obtained permitting the joinder of the Villa heir. ( App. p. 1&5 )

The United States Court of Appeals for the Fourth Circuit denied these motions and affirmed the dismissal but as previously stated said that the trial court committed error by dismissing under rule 19(b) but that they would affirm the dismissal under rule 41(b) . This in spite of the fact that 41(b) had never been mentioned in the court below, it had never been mentioned in any of the briefs and arguments presented to the United States Court of Appeals for the Fourth Circuit and plaintiffs were never given any opportunity to speak or file anything in opposition to the dismissal under rule 41 (b).

Plaintiffs filed a petition for rehearing and suggestion for rehearing en banc on the 10th day of June, 1983. This petition was denied on the 6th day of July, 1983 and plaintiffs appealed to this court.

## ARGUMENT

Since the United States Court of Appeals for the fourth circuit held that it was error to dismiss this action under rule 19(b) and proceeded to affirm the order of dismissal using rule 41(b) petitioner will first address the 41 (b) dismissal.

First. The pertinent part of rule 41(b) reads as follows:

> "INVOLUNTARY DISMISSAL: EFFECT THEREOF. For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of any action or of any claim against him."

A mere glance at the civil docket sheet showing the activity in this case ( app. p 60 ) shows that there was no failure to prosecute. In fact plaintiffs were barred from any effective prosecution of their case for fourteen (14) months as is shown by the following.

Plaintiffs filed this action on April 1, 1980. An amended complaint was filed on October 9, 1980.

Voluminous discovery, 1876 pages, took

place from the filing of the complaint until January 16, 1981, as shown by Civil Docket Sheet in 82-1402 ( App. p. 60)

On January 16, 1981, nine (9) months after filing of the original complaint and three (3) months after the filing of the amendedcomplaint, Judge Ramsey entered an order staying all discovery until he ruled on the motion to dismiss. (App. p 46 )

This order was entered when all persons having an interest in the litigation had either been joined or had assigned their rights to plaintiffs. And when plaintiffs were attempting the following discovery:

> Nov. 4, 1980 - Nr. 36 - Request (second) of plaintiff for Production of Documents and exhibit A
> Nov. 4, 1980 - Nr. 37- Notice of Plaintiffs to take Deposition of Dr. James F. R. Sieper and R. E. Perkinson and Request for Production of Documents.
> Nov. 4, 1980- Nr. 38 - Notice of Plaintiffs to take Deposition of Melanie Lawson and James J. Sidebotham.

Nov. 13, 1980- Nr. 39 - Notice (2) of Plaintiffs to take Deposition of the Chessie System and John S. Connor, Inc., on December 1, 1980, and Request for Production of Documents.
Nov. 13, 1980 - Nr. 40 - Notices (2) of Plaintiffs to take Depositions of Albert Knighton, John S. Connor, Inc. and Gordon Broadfoot, John S. Connor, Inc. on December 3, 1980.

On May 29, 1981, Judge Ramsey lifted the stay on discovery only to allow defendants to enquire into the consideration for the assignments (which plaintiffs felt was totally unnecessary as the assignors could never deny or disaffirm the assignments whether they were for a consideration or not) italics ours.

Thus from three months after the amended complaint until the order of dismissal, plaintiffs were barred from doing any discovery, even that already noticed.

Nevertheless, plaintiffs brought Ruben Antonio from Argentina to defendant's offices in Baltimore to be deposed regarding consideration (112 pages) and brought Roland Petersen from Florida for the

same purpose ( 186 pages) and J. Nat Hamrick, Jr. for the same purpose ( 136 pages).

During this time, counsel, J. Nat Hamrick, Sr.'s, younger son, Brown Hamrick, was having a very serious operation in connection with an automobile accident and counsel asked to continue these depositions so that he could be with his son during this time.

Subsequently it became apparent to plaintiffs appellants that the discovery regarding consideration would continue to consume considerable time which plaintiffs felt could be better used in moving the action along.

Therefore, plaintiffs, J. Nat Hamrick, Jr. and C.Dula Hawkins, spoke to their good friends, Roland Petersen and Ruben Antonio and asked them to cancel their assignments and join the action as formal parties to the end that the action could proceed. The Petersen and Antonio motion to join as parties plaintiffs was filed on Nov. 30, 1981. ( App. p. 42 ) . This

motion was never ruled upon until the action was dismissed at which time it was declared to be "moot" because plaintiffs had not joined necessary parties ( referring to the Argentine minor) At that time there was an order granting her motion to join. ( App. p. 45 )

Meanwhile, plaintiffs continued to request that the defendant honor their verbal agreement to notorize the McCall letter to the end that it could be send to the Children's Court in Argentina to obtain approvail of the joinder. This the defendants declined to do.

In a further effort to obtain the Argentine Courts approval of the joinder of the Argentine minor, plaintiffs filed a motion to compel the defendants to authenticate the said letter and also moved to appoint a member of a lawfirm in Maryland as guardian for the minor so that she could be represented in the United States District Court of Maryland. ( Motion to Compel, app. p. 79 )

Plaintiff respectfully submits that it is perfectly apparent that dismissing this case under

rule 41 (b) for failure of plaintiffs to prosecute or to comply with these rules or any order of this Court was clearly error because plaintiffs were doing everything possible to join the Argentine minor and had filed a motion to join Petersen Enterprises, Inc. and Ruben Antonio, who were the only other possible plaintiffs. The United States Court of Appeals held that the dismissal under rule 19(b) was error. Nevertheless, it affirmed relying on rule 41(b).

This ruling suberted the express purposes set forth in rule 19(b) and was in clear violation of the principles so specifically set out by this honorable court in an opinion written by Justice Harlan in the case of Provident Bank and Trust Co. v Patterson 390 US 102, 19 L Ed 2d 936, 88 S Ct 733 on page 949 of the Lawyers Edition Justice Harlan says:

> " Application of Rule 19(b)'s 'equity and good conscience' test for determining whether to proceed or dismiss would doubtless

have led to a contrary result below. The Court of Appeals' reasons for disregarding the Rule remain to be examined. "

All through this opinion it is perfectly apparent that this honorable court intended to clear up forever the question of whether or not the four criteria in rule 19(b) should be followed. They were not followed in the case and that is the reason the Court of Appeals could not affirm a dismissal under rule 19(b), the pertinent parts of rule 19(b) read as follows:

> "(b) DETERMINATION BY COURT WHENEVER JOINDER NOT FEASIBLE.
>
> If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have adequate remedy if the action is dismissed for nonjoinder."

We now respectfully call the courts attention to a judgment which we proposed to the trial court which was essentially this: Plaintiffs agreed to hold 1/5 of the recovery in trust for the Argentine minor. Plaintiffs agreed to pay all costs in case the litigation was lost. If the Argentine minor in the Children's Court in Argentina accepted 1/5 of the recovery she would be estopped to come here and bring another lawsuit. If she did not accept 1/5 of the recovery the recovery could be held in trust until she no longer had a right to bring an action under this contract, at which time it could be paid to her.

If the minor did not accept 1/5 and came to the United States and sued the defendants she would have a very difficult time overcoming the doctrine of collateral estoppel. However, if she did overcome that doctrine and litigated the action the 1/5 being held in trust for her could be used to reduce the amount of any judgment that she might get against the defendants. If this had been followed everybody would have been protected and the case could have gone to trial.

We certainly think that the Court of Appeals should have allowed our motion for Suspension of the Rules and let us introduce the authority of the Argentine court given to Ms. Villa to intervene in this case as guardian for her daughter. Had they permitted the introduction of this document, and remanded the case at that time, Ms. Villa's joinder would have been approved by the Argentine courts and Ruben Antonio and Petersen Enterprises, Inc. could have been joined and all the necessary parties plaintiff would have been present in the litigation and it could have been

tried out on its merits. The failure of the Court of Appeals to do this we contend was error, because:

The dismissal of this case will not save any judicial time nor prevent the trial of the case as fully and completely as if all parties were there because the Argentine minor may still bring an action in the United States District Court for Maryland. If she does so the case will be tried and nothing will be accomplished by this dismissal except the defendants will be allowed to benefit by their own wrong ( save 4/5 of any damages) in refusing to authenticate the McCall letter and obstructing the progress of this action , so that the minor's joinder could be approved by the Argentine court.

The ruling in this case is directly in contra to the decision of the United States Court of Appeals for the Second Circuit in the case of Drive-In Theater, Inc. plaintiff appellant vs. Warner Brothers Pictures Inc. defendants, appellees 252 F 2d 856. In this

case plaintiffs were faced with the delay which was occasioned in part by the defendants. The Court said on page 857:

> "Moreover, defendants must have known that their vigorous pressing of the disqualification issue including their appel to the district court's original refusal, would necessarily involve additional delay; they obviously concluded that the counsels elimination was a sufficiently necessary tactical step to justify the delay thus caused. We think that the interest of justice require that these actions be restored to the district court's docket for eventual trial and judication."

This case involved a case where a counsel was disqualified and they were attempting to get other counsel.

In this case, lead counsel resigned from the case and plaintiffs were required to rely on counsel who had had very little participation in the case up to that time.

In Dyotherm Co. vs. Turbo Machine Co. 392 F2 146 where the United States Court of Appeals for the third circuit reversed a dismissal of a case for failure to prosecute, which case had been pending

from August 29, 1962 until November 22, 1966 and the court had observed that a good bit of the delay was due to the defendants activity.

In this case very substantial delay was due to the defendants activity in insisting upon and getting a stay of discovery and then getting discvoery to go into the consideration for the assignments which consumed substantial discovery time when a lack of consideration would not have defeated the assignment.

In the following cases the court has stated a dismissal for lack of prosecution under rule 41 (b) is extremely harse. In Lifer vs. Carter 274 F 2d 815, the Court says:

> "The Court has and should have a wide discretion as to penaltics for failure of diligent prosecution in litigation. Had the Court contented itself with merely dismissing the present action without predjudice, we should not have thought it necessary to interfere. But as it stands, the plaintiffs face a permanent bar for a delay which in our congested trial courts is hardly unusual... under the circumstances the doom entered below seems all together too final and definitive we think the action should take the more normal course of pleading and disposition in ways less abrupt." ( Emphasis added. )

Plaintiffs filed a petition for rehearing in the United States Court of Appeals for the Fourth Circuit with request for rehearing en banc.

The United States Court of Appeals for the Fourth Circuit denied the motion for petition for rehearing and plaintiffs appealed to this honorable court. ( App. p. 20)

See also Reizakis v. Loy 490 F 2d 1132 ( 4th Cir. 1974)., Dugan vs. Graham 372 F 2d 130, 131 (5th Cir. 1967).

## CONCLUSION

This case is a prime example of the present trend to use and abuse the rules of civil procedure to make it so difficult and expensive to finally adjudicate litigation on its merits that the primary purpose of the courts - TO ADMINISTER JUSTICE- is subverted and many times defeated. Plaintiffs here did everything in their power to expedite this litigation while defendants did everything in their power to obstruct it.

When plaintiffs finally obtained the approval of the Argentine Courts ( which they felt was not necessary)

the United States Court of Appeals for the Fourth Circuit refused to amend the record to show that approval when such an amendement would have made it possible for the case to be decided on its merits. Instead, after holding that it was error to dismiss under rule 19(b), as the trial judge did, proceeded to affirm under rule 41(b) which had never even been mentioned in the trial court.

SURELY THIS IS A CASE WHERE THIS HONORABLE COURT SHOULD EXERCIZE ITS SUPERVISORY POWER TO MAKE IT CLEAR THAT THE ADMINISTRATION OF JUSTICE, NOT THE MANIPULATION OF THE RULES TO DISMISS CASES, IS THE PRIME RESPONSIBILITY OF THE COURTS OF THIS LAND. SUCH A FIRM DECISION BY THIS COURT WOULD DO MORE THAN ANYTHING ELSE TO EXPEDITE LITIGATION, CLEAR DOCKETS AND TRY CASES ON THEIR MERITS. (emphasis ours)

Respectfully submitted this the 3rd day of Oct. 1983.

J. Nat Hamrick- Hamrick and Hamrick
PO Drawer 470
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704-287-3359
Counsel for Petitioners

## ENTRY OF APPEARANCE

J. Nat Hamrick, Attorney for Petitioner, a member of the bar of this Honorable Court , does hereby enter his appearance in this Court for the purpose of representing Petitioner in this action.

J. Nat Hamrick
Hamrick and Hamrick
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Rutherfordton, NC 28139
704-287-3359

## CERTIFICATE OF SERVICE

This is to certify that the undersigned, a member of the bar of this Court, served this Petition for a Writ of Certiorari and Appendix thereto upon the opposing counsel by depositing at least three copies of the Petition and three copies of the Appendix in the United States mail addressed as follows:

Morton A. Sacks, Ray Fidler
and Thomas L. Crowe
Cable, McDaniel, Bowie and Bond
900 Blaustein Building
Baltimore, Maryland 21201

This the 3rd day of October, 1983.

J. Nat Hamrick
Hamrick and Hamrick
PO Drawer 470
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704-287-3359
Attorney for Petitioners